

NO. 48169-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

PATRICK E. LEWIS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00463-8

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Lewis Had the Benefit of Effective Assistance of Counsel and Cannot Show Any Prejudice (Assignment of Error No. 2).**
- II. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.**

STATEMENT OF THE CASE

Patrick Lewis (hereafter 'Lewis') was charged in Clark County Superior Court Cause No. 15-1-00463-8 with one count of Assault in the Second Degree – Domestic Violence for an incident of strangulation that occurred on March 13, 2015 involving Ayesha Johnson. CP 1. The matter proceeded to trial in Clark County Superior Court before the Honorable Derek Vanderwood on September 14 and 15, 2015. CP 53; RP 1, 179. The jury returned a verdict of guilty on the Assault in the Second Degree charge and found that Lewis and Ms. Johnson were members of the same family or household by special verdict. CP 51-52. Lewis was sentenced to a standard range sentence. CP 56. He timely appeals his conviction. CP 69.

Ms. Johnson knows Lewis through her family because he is the father of her cousin's child. RP 76. Ms. Johnson began a romantic relationship about three years prior to the time of trial with Lewis. RP 77. She testified their sexual relationship had begun about eight years prior.

RP 77. Ms. Johnson believed she and Lewis were in a dating relationship on March 13, 2015. RP 77-78.

On March 13, 2015, Ms. Johnson and Lewis were spending time together, but Lewis was “hostile” and upset. RP 79. They went to a bar, then drove around for awhile, ending back up at the Motel 6 in Vancouver where Ms. Johnson was staying. RP 79-82. At the Motel 6 parking lot, Ms. Johnson and Lewis were in the vehicle and Lewis was yelling at Ms. Johnson. RP 82. Ms. Johnson intended to get out of the vehicle, but she and Lewis “got into it” and Lewis “choked” Ms. Johnson to the point where she couldn’t breathe and couldn’t get up. RP 82. Ms. Johnson was laid down on the armrest of the car and Lewis’s body was over hers with his hands around her neck. RP 83. Ms. Johnson couldn’t breathe and was kicking at the window of the car. RP 83. Ms. Johnson was trying to talk, but couldn’t, and was crying and covering her face with her hands. RP 83. Lewis let go of her throat and Ms. Johnson gasped for air, and she tried to hit him and get herself out of the vehicle. RP 85. Ms. Johnson had her shoes in her hands and tried to hit him with those. RP 85. She got out of the vehicle, but so did Lewis. RP 85-86. Lewis wanted to go inside her motel room, but Ms. Johnson did not want to go in there with him. RP 86. Ms. Johnson was trying to get her purse out of Lewis’s car, and eventually did and went to her car. RP 86. She thought about running Lewis over

with her car, but then thought better of it. RP 87. Ms. Johnson called Lewis and told him he was going to jail, and then called 911. RP 87.

The recording of the 911 call entered at trial shows Ms. Johnson called 911 on March 13, 2015 at approximately 2:30 in the morning. RP 90. In the 911 call, Ms. Johnson told the dispatcher that “the person [she] [had] been seeing” became hostile, grabbed for her phone and purse, would not let her out of the car, and grabbed her by her hair and rammed her head into the dash of the car and then “choked [her] out.” RP 91. Ms. Johnson indicated he choked her to the point where she could not breathe. RP 91. She reported to the dispatcher that this person was Patrick Lewis and that he then drove off in his vehicle. RP 92-94.

Officer Scott Burnette of the Vancouver Police Department responded to the victim’s 911 call. RP 150, 152. He made contact with Ms. Johnson at about 2:40 a.m. RP 152. Ms. Johnson was upset and crying, and she was talking very excitedly. RP 153. She described that incident to Officer Burnette, telling him that Lewis was upset that she was texting on her phone and he grabbed her phone and pushed her head into the passenger side window of the car. RP 155. She told him that Lewis grabbed her around her throat, and used his body weight to put her in a chokehold which prevented her from breathing for almost 30 seconds. RP 155. Ms. Johnson indicated to Officer Burnette that her jaw hurt, her voice

was not typically as deep as it then was, and she had difficulty swallowing. RP 155-56. Officer Burnette witnessed Ms. Johnson rubbing her jaw and grimacing while swallowing during his contact with her. RP 156. Officer Burnette also observed reddening to the right side of Ms. Johnson's throat, and a little reddening to the left side. RP 157. He took photographs of the injuries, which were admitted at trial. RP 159.

Ms. Johnson testified at trial that she did not have a play by play memory of the incident, but that she remembers being choked and being hurt. RP 97. The strangulation caused Ms. Johnson to have marks around her neck that lasted over a week, that it was hard to swallow for over a month, and that it was painful. RP 97.

Ms. Johnson and Lewis exchanged text messages after the assault. RP 233. In one message, Lewis said to Ms. Johnson, "I was wrong and I feel like a piece of shit. I don't know what's the matter with me, but you don't deserve for me to take out what's going on with me on you. I love you." RP 234. In another text message, Lewis said, "...I apologize, Aisha. I really do." RP 236. In yet another message, Lewis said, "I swear I apologize. Sincerely. It's a monster in me, bae." RP 237.

Lewis filed a motion in limine prior to trial, asking to exclude evidence relating to Lewis's criminal history and/or his federal probation status. CP 5. The State agreed and the Court granted Lewis's motion to

exclude evidence of his criminal history and his status on probation. RP 8-

10. During cross-examination of Ms. Johnson, the following exchange with defense counsel took place:

Q. Ms. Johnson, how long have you known Mr. Lewis?

A. I would say ten-plus years.

Q. As a matter of fact, Mr. Lewis has a child, doesn't he?

A. Yeah.

Q. And the mother of his child is your -- is it your cousin?

A. My first cousin, yes.

Q. And you said earlier you were in a romantic relationship. How long did you say you were in a romantic relationship?

A. Altogether, I'd probably say about a year.

Q. About a year?

A. Yeah. There was a gap in between the time. So about a year.

Q. So it wasn't eight like you said earlier, correct? It was a year?

A. Well, he was incarcerated so it was an on-and-off relationship, I guess. It was either phone, letters.

Q. And you previously lived in Portland before you moved to Motel 6; is that correct?

A. Prior to Motel 6?

RP 104-05. Defense counsel did not object or move to strike Ms. Johnson's response to his question, nor did he move for a mistrial or request the court instruct the jury.

ARGUMENT

I. **Lewis Received Effective Assistance of Counsel and Cannot Show Prejudice.**

Lewis claims his counsel was ineffective for failing to move for a mistrial after Lewis elicited testimony from the victim that the defendant had been incarcerated at some point previously. Lewis has not shown that his counsel's performance was deficient or that the trial court would have granted a mistrial had one been requested. Lewis's claim fails.

This court reviews a claim of ineffective assistance of counsel *de novo* because it presents a mixed question of law and fact. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The defendant bears the burden of showing both deficient performance and resulting prejudice. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To establish prejudice, a defendant must show a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d

222, 226, 743 P.2d 816 (1987). Thus, to show prejudice, Lewis must show a reasonable probability that had trial counsel moved for a mistrial, the trial court would have granted that motion. *See Thomas*, 109 Wn.2d at 226.

A trial court should grant a mistrial when, viewed in light of all the evidence, the defendant has suffered prejudice such that nothing short of a new trial will insure that the defendant has received a fair trial. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002); *State v. Thompson*, 90 Wn.App. 41, 47, 950 P.2d 977 (1998). Whether a remark justifies a mistrial depends on three factors: (1) whether the irregularity was serious enough to materially affect the trial's outcome, (2) whether the statement in question was cumulative of other evidence, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. *State v. Hopson*, 113 Wn.2d 273, 284–86, 778 P.2d 1014 (1989). Even serious irregularities can be cured by an instruction to disregard. *See State v. Gamble*, 168 Wn.2d 161, 178–79, 225 P.3d 973 (2010).

Here, the victim testified that her relationship with Lewis was off and on and that he had been incarcerated at some point. RP 104-05. Lewis contends that this statement regarding his prior incarceration was so prejudicial that the trial court would have granted a motion for a mistrial.

It is hard to imagine this fleeting remark, that was never again discussed or argued, was serious enough to affect the trial's outcome. Though Lewis claims the victim testified that she and Lewis were only together for one year out of the past eight because of his incarceration (leaving the reader to understand the victim meant the defendant had been incarcerated for seven years), this is not the substance of the victim's testimony. *See* Br. of Appellant, p. 11. The victim's testimony was ambiguous, indicating that she and the defendant had known each other for ten years, had had a sexual relationship for eight years, had had a romantic relationship starting three years prior, and had been "together" for a total of one year off and on, in part due to Lewis's incarceration. RP 76-78. The mention of incarceration was fleeting, defense immediately moved on, and it was never discussed again. Further, an instruction surely would have obviated any potential for prejudice this statement might have caused. Case law supports that this type of evidence is harmless and not a sound basis for an ineffective assistance claim.

In *State v. Condon*, 72 Wn.App. 638, 649–50, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031 (1994), a witness improperly made a reference about the defendant having been in jail while testifying in the trial. *Condon*, 72 Wn.App. at 649. On appeal, the court observed that "although the remarks may have had the potential for prejudice, they

were not so serious as to warrant a mistrial.” *Id.* at 649-50. In fact, the Court found the witness’s reference to the defendant having been in jail “ambiguous.” *Id.* at 649. In *Condon*, the witness never indicated the reason for the defendant’s incarceration, same as in Lewis’s case. The Court in *Condon* reasoned, “[t]he mere fact someone has been in jail does not indicate a propensity to commit murder, and the jury just as easily could have concluded that Condon was in jail for a minor offense.” *Id.* Similarly, in Lewis’s trial, the victim’s fleeting comment about him having been incarcerated was not so serious that it would require a mistrial. Therefore, Lewis cannot show prejudice resulting from trial counsel’s failure to move for a mistrial and his ineffective assistance of counsel claim fails. *Thomas*, 109 Wn.2d at 226.

Furthermore, defense counsel did not object to the comment. Had Lewis objected or requested an instruction, the trial court could have instructed the jury to disregard the comment and there would be no grounds for a mistrial. A jury is presumed to follow the trial court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). However, the decision not to request that the trial court instruct the jury to disregard an inadvertent comment is a legitimate trial tactic because it prevents calling unnecessary jury attention to the comment. Accordingly, the victim’s comment was not sufficient grounds for a mistrial because the

error could have been cured with an instruction to the jury. *Weber*, 99 Wn.2d at 166; *Condon*, 72 Wn.App. at 650. And defense counsel's decision not to request an instruction was a legitimate trial tactic and not deficient performance because it was entirely reasonable to not want to call additional attention to the statement.

Lewis has failed to show his counsel's performance was ineffective. Lewis suffered no prejudice and received a fair trial. His conviction should be affirmed.

II. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

Lewis argues under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016) at p. 2-3; *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131

Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn.App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair*, *supra* at 5, prematurely raises an issue that is not yet before the Court. Lewis could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, *supra*, the Court indicated that trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out at p. 5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” *See* RCW 10.73.160(4).

In this case, the State has yet to “substantially prevail” and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

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CONCLUSION


For the foregoing reasons, Lewis's conviction should be affirmed.

DATED this 13th day of June 2016.

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